

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MOSTAFA HAMSHO	:	DETERMINATION
for Redetermination of Deficiencies or for	:	
Refunds of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and City of	:	
New York Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Years 1981 through 1984.	:	

Petitioner, Mostafa Hamsho, 15 McKay Place, Brooklyn, New York 11209, filed a petition for redetermination of deficiencies or for refunds of New York State personal income tax under Article 22 of the Tax Law and City of New York personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1981 through 1984 (File No. 805419).

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on December 7, 1988 at 9:15 A.M., with all briefs to be submitted by June 22, 1989. Petitioner appeared by Melvin L. Greenwald, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether, for the years at issue, petitioner was a domiciliary of the State of New York and City of New York and thereby a resident individual for purposes of such State and City personal income taxes.

II. If so, whether the Division of Taxation properly determined additional State and City personal income taxes due from petitioner for the years at issue.

III. Whether the Division of Taxation properly imposed penalties in connection with the personal income tax deficiencies asserted herein.

FINDINGS OF FACT

Pursuant to an audit which commenced on October 15, 1984, the Division of Taxation, on August 6, 1987, issued statements of personal income tax audit changes to petitioner, Mostafa Hamsho, for each of the years 1981 and 1982 which contained the following explanation:

"Based on a New York State Tax audit, you have been deemed a New York State and New York City resident.

A resident credit is allowed only when a New York State resident, files a nonresident return in another State for income taxes imposed on income earned in that other State. Therefore, your request for Resident Tax Credit is disallowed."

Pursuant to the aforesaid, personal income tax deficiencies were asserted against petitioner as follows:

	<u>1981</u>	<u>1982</u>		
	<u>State</u>	<u>City</u>	<u>State</u>	<u>City</u>
Add'l Tax Due	\$4,301.00	\$1,828.00	\$3,163.00	\$1,297.00
Penalties				
685(a)(1)	968.00	411.00	712.00	292.00
685(a)(2)	1,075.00	457.00	791.00	324.00
685(b)	215.00	91.00	158.00	65.00
Interest	<u>2,804.00</u>	<u>1,192.00</u>	<u>1,481.00</u>	<u>607.00</u>
Total	\$9,363.00	\$3,979.00	\$6,305.00	\$2,585.00

The 1981 and 1982 deficiencies were based upon net income adjustments in the amounts of \$51,815.00 and \$38,025.00, respectively. These net adjustments were calculated from information obtained from petitioner's Federal income tax returns. Petitioner filed no State and City returns for 1981 or 1982.

On February 23, 1988, the Division of Taxation issued notices of deficiency to petitioner as follows:

	<u>1981</u>	<u>1982</u>
Add'l Tax Due	\$ 6,129.00	\$4,460.00
Penalty	3,280.98	2,342.00
Interest	<u>4,327.50</u>	<u>2,302.39</u>
Total	\$13,737.48	\$9,104.39

At the hearing held herein, petitioner conceded that, if it is determined that he was a resident taxpayer for the years 1981 and 1982, the amounts contained on the aforesaid notices of deficiency are correct and are, therefore, due and owing.

With respect to 1983, the Division of Taxation again obtained information from petitioner's Federal return for said year (petitioner did not file a State or City return for 1983) and, as a result thereof, determined additional tax due of \$4,514.45 (\$3,158.00 State tax and \$1,356.45 City tax). In addition, penalties pursuant to Tax Law § 685(a)(1), (2) and (b) were imposed together with interest for a total amount due of \$8,379.84 for 1983 as of December 3, 1987.¹ As was the

case for the years 1981 and 1982, petitioner conceded at the hearing that, if it is determined that he was a resident taxpayer for 1983, the deficiency of tax asserted against him by the Division of Taxation for 1983 is correct and is, therefore, due and owing.

For 1984, petitioner timely filed (pursuant to a valid extension) a New York State and City Nonresident Income Tax Return on which he reported Federal wage income of \$85,000.00,

¹A Statement of Personal Income Tax Audit Changes was issued to petitioner on December 3, 1987 which included both the years 1983 and 1984.

\$65,000.00 of which he attributed to New York sources. He also reported dividends of \$80.00 which he claimed were not taxable to New York. The Division of Taxation, in the Statement of Personal Income Tax Audit Changes, deemed the \$20,000.00 wage income and \$80.00 dividend income as New York source income and included as additional income the sum of \$450,000.00 which petitioner received from a boxing contest held in New York City pursuant to an Exclusive Promotional Rights Agreement (hereinafter "Agreement") entered into between petitioner and Top Rank, Inc. Corrected taxable income for 1984 was, therefore, determined to be \$522,980.00 with additional State tax due thereon in the amount of \$46,442.00 and additional City tax due thereon in the amount of \$22,899.55 (total tax due of \$69,341.55). Penalty pursuant to Tax Law § 685(b) was imposed along with interest for a total amount due (as of the date of issuance of the Statement of Personal Income Tax Audit Changes) of \$89,189.23.

On February 23, 1988, a Notice of Deficiency was issued to petitioner in the amount of \$73,856.00 plus penalty and interest for a total amount due of \$98,807.15 for the years 1983 and 1984.

For each of the years at issue herein, petitioner was a pugilist. He came to the United States as an illegal alien from Syria in late 1974. Upon his arrival from Syria on a freight ship, he lived with friends in Paterson, New Jersey and in New York City. Subsequently, he rented a room located at 140 Atlantic Avenue, Brooklyn. In 1977, he moved to an apartment at 244 96th Street, Brooklyn. In 1981, due to marital difficulties, petitioner moved from this apartment. Between 1981 and late 1984, petitioner resided with a friend in a one-family house (petitioner lived in the basement) at 175 Oakland Road, Clifton, New Jersey and at his manager's house (petitioner had a room in this house) at 1259 Paterson Plank Road, Secaucus, New Jersey.

Soon after the separation, petitioner's wife moved from the Brooklyn apartment and began living in Bayonne, New Jersey. However, because of rent control, petitioner continued to rent the apartment on 96th Street in Brooklyn. Petitioner stated that, during the period when he lived in Clifton and Secaucus in New Jersey, he would stay in his Brooklyn apartment approximately once or twice per month.

The auditor initially attempted to contact petitioner by sending a letter to 140 Atlantic Avenue, Brooklyn, New York. This letter was returned since the forwarding order had expired. From petitioner's Federal return for 1981, the auditor obtained the 1259 Paterson Plank Road, Secaucus, New Jersey address whereupon he sent a letter to this address. As a result thereof, petitioner's accountant, Alan Epstein, contacted the auditor to set up an appointment to conduct the audit at Mr. Epstein's office.

Pursuant to the Agreement (see, Finding of Fact "3"), petitioner was to engage in a middleweight boxing contest with an opponent to be selected by the promoter (Top Rank, Inc.), such contest to be held during March or April 1984.² In the event that petitioner was the winner of such bout, he was to fight the winner of a championship bout between Marvin Hagler and Juan Roldan (scheduled for March 30, 1984), such bout to be held in 1984 on a date and at a site to be selected by the promoter. Petitioner fought Marvin Hagler on October 19, 1984 at Madison Square Garden in New York City.

The terms of the Agreement set forth the following financial terms relative to petitioner:

²While the record is devoid of the details of this bout, it is apparent that petitioner engaged in and won such bout since it is uncontroverted that he subsequently fought Marvin Hagler in a world middleweight championship contest.

(a) Petitioner was to receive \$25,000.00 upon the signing of the Agreement, such payment to constitute an advance against the total purse to be paid to him for the championship bout (the agreement set forth certain conditions upon which petitioner would be required to refund this money; however, based upon the facts produced herein, none of these conditions occurred);

(b) Petitioner was to receive \$50,000.00 upon completion of the first bout (the bout to be held in March or April 1984);

(c) Petitioner was to receive \$450,000.00 for the championship bout if the opponent was Marvin Hagler and \$350,000.00 if the opponent was Juan Roldan (petitioner's opponent was Marvin Hagler). Petitioner was to receive \$25,000.00 upon the signing of the Agreement, \$25,000.00 not later than 10 days after the conclusion of the Hagler v. Roldan bout and the balance (\$400,000.00 because the opponent was Hagler) upon completion of the championship bout. On the agreement, petitioner's address was listed as 1259 Paterson Plank Road, Secaucus, New Jersey.

Petitioner initially applied for a boxing license from the New York State Athletic Commission in 1976. The address set forth on such application was 140 Atlantic Avenue, Brooklyn, New York. Petitioner's license was updated in 1979 at which time he indicated that his address was 244 96th Street, Brooklyn, New York. As of October 1984, when the auditor visited the offices of the State Athletic Commission, petitioner had not filed an address change with such Commission.

During the course of the audit, the auditor contacted petitioner's accountant, Alan Epstein (whose office was the situs of the audit) to advise him that petitioner was subject to the estimated tax filing and payment requirements of the New York State Tax Law. On December 18, 1984, the Division of Taxation received from petitioner an estimated tax payment of

\$5,000.00.³ The payment voucher indicated petitioner's address as 244 96th Street, Brooklyn New York. The check accompanying said voucher was drawn on petitioner's account at Manufacturers Hanover Trust Company, 7510 Fifth Avenue, Brooklyn, New York.

For the tax year 1984, petitioner received a Form W-2, Wage and Tax Statement from Hamcer, Inc., 1259 Paterson Plank Road, Secaucus, New Jersey which listed wages, tips or other compensation in the amount of \$85,000.00 with State (New Jersey) wages of \$20,000.00 (\$1,200.00 was withheld for State income tax). Petitioner's address, set forth on this W-2 form, was 244 96th Street, Brooklyn, New York.

After the Hagler fight (October 19, 1984), petitioner went to Syria for a time. When he returned to the United States (in late 1984 or early 1985), he moved back to Brooklyn. His current address is 15 McKay Place, Brooklyn, New York. During all of the years at issue, petitioner had a New York State driver's license. While he became a United States citizen in approximately 1979, petitioner neither registered nor voted in any state.

For the years 1982 and 1983, petitioner filed resident New Jersey tax returns. While New Jersey returns for 1981 and 1984 were not produced, W-2 forms issued to petitioner by Hamcer, Inc. indicate that State (New Jersey) income taxes were withheld for such years.

³It should be noted that the deficiency asserted against petitioner for the year 1984 is net of such payment, i.e., petitioner was credited with having paid this amount.

Hamcer, Inc. did not file a New York State Corporation Franchise Tax Report for 1984 despite the fact that income (proceeds from petitioner's bouts per the Agreement) was earned from New York sources for that year.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner's position may be summarized as follows:

(a) During the years at issue, he was a domiciliary of New Jersey. While petitioner maintained an apartment at 244 96th Street in Brooklyn, he did not reside there but rather he continued to rent this apartment as a convenience for relatives and because the rent was so reasonable. His use of a New York address on his boxing license was done for salesmanship and public relations purposes since it was felt that by appearing to be a New Yorker, ticket sales for New York City bouts would be considerably greater;

(b) The entire proceeds received from the bouts which petitioner participated in pursuant to the terms of the Agreement were paid to petitioner's corporation, Hamcer, Inc. Out of these proceeds, his manager, trainer, publicity man, etc. were paid and, as indicated by the W-2 form issued by the corporation to petitioner, he received \$85,000.00 for 1984

rather than the entire \$450,000.00 attributed to him by the Division of Taxation; and

(c) In the event that it is determined that petitioner was a resident for purposes of New York State and City income taxes and that he is, therefore, liable for payment of such taxes, assessment of penalties should be cancelled since petitioner reasonably believed that he was a New Jersey domiciliary and complied with that State's laws by filing returns and paying New Jersey income tax.

The Division of Taxation's position is as follows:

(a) The evidence produced at the hearing is indicative of the fact that petitioner remained a domiciliary and a resident of New York for all of the years at issue and, as such, petitioner is liable for State and City taxes asserted herein;

(b) Despite petitioner's contention that all fight proceeds were paid to his New Jersey corporation (Hamcer, Inc.) no franchise tax report was filed by the corporation (see, Finding of Fact "12"). In addition, while petitioner seeks deductions for amounts paid to his trainer, manager and other personnel, he has failed to substantiate such expenses and is, therefore, not entitled to any deductions from the \$450,000.00 fight proceeds attributed to him by the Division; and

(c) Petitioner has failed to establish reasonable cause for failure to file returns, pay taxes, etc. and, as such, such penalties were properly imposed.

CONCLUSIONS OF LAW

A. Tax Law § 605 (former [a]), in effect for the years at issue, defined a "resident individual" as one

"(1) who is domiciled in this state, unless

(A) he maintains no permanent place of abode in this state, maintains a

permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state or...

(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

Section T46-6.0(a) of the Administrative Code of the City of New York contains a similar provision with respect to the definition of this term as it applies to City of New York personal income tax.

20 NYCRR 102.2(d) provides, in pertinent part, as follows:

"(1) Domicile, in general, is the place which an individual intends to be his permanent home--the place to which he intends to return whenever he may be absent.

(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

20 NYCRR 102.2(e)(1) provides, in pertinent part, as follows:

"A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

B. In Matter of Newcomb (192 NY 238, 250) the Court of Appeals stated:

"Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

The existing domicile, whether of origin or selection, continues until a new

one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals."

In Matter of Bourne's Estate (181 Misc 238, affd 267 App Div 876, affd 293 NY 785) the test of intent to effect a new domicile was stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it."

To change one's domicile requires an intent to give up the old and take up the new, coupled with an actual acquisition of a residence in the new locality (Matter of Newcomb, *supra*). Moreover, the evidence to establish the required intention to effect a change in domicile must be clear and convincing (Ruderman v. Ruderman, 193 Misc 85, 82 NYS2d 479, affd 275 App Div 834).

C. Petitioner has wholly failed to sustain his burden of proving that he changed his domicile from New York to New Jersey in 1981. While he moved from Brooklyn to Clifton and then to Secaucus, New Jersey, at no time did he establish a "permanent place of abode" as that term is defined in 20 NYCRR 102.2(e)(1). In Clifton, New Jersey, he resided with a friend, living in the basement of his friend's home. In Secaucus, New Jersey, petitioner had a room in his manager's house. At no time did he own or lease a dwelling place of his own in New Jersey. Moreover, during the years at issue, petitioner continued to rent and, for some period of time each month, continued to reside in the apartment at 244 96th Street in Brooklyn, said apartment having been his permanent place of abode from 1977 until 1981. While there may well have been a business motive in continuing to list the Brooklyn address on his boxing license, petitioner, nonetheless, held himself out as a New York resident during this period. In late 1984 or early 1985, petitioner resumed living in Brooklyn and, as of the present time, continues to do so. Therefore, it is hereby found that for all of the years at issue herein, petitioner was a New York domiciliary and, as such, was a "resident individual" for purposes of New York State and City of New York personal income taxes.

D. Tax Law § 612(a) provides that, except for certain modifications not relevant herein, the New York adjusted gross income of a resident individual means his Federal adjusted gross income for the taxable year. Administrative Code § T46-12.0(a) contains a similar provision with respect to City personal income tax. Therefore, petitioner's income, regardless of source, is subject to State and City personal income taxes for the years 1981 through 1984.

E. Based upon petitioner's concession (*see* Findings of Fact "2" and "3") that the tax deficiencies for 1981 through 1983 are correct taken in conjunction with the determination herein that petitioner was a resident taxpayer for such years (*see*, Conclusion of Law "C"), such deficiencies (exclusive of penalties, the issue of which will hereinafter be addressed) are sustained in their entirety.

F. For the year 1984, while it has been determined (*see*, Conclusion of Law "C") that petitioner was a resident taxpayer for such year and, as such, all of his income was subject to State and City personal income taxes (*see*, Conclusion of Law "D"), the amount of the deficiency asserted against petitioner for 1984 is not correct. There is no evidence that petitioner earned income from any source other than from the proceeds of the bouts in which he participated pursuant to the terms of the Agreement. Such Agreement (*see*, Finding of Fact "6") provided that petitioner was to receive a total of \$500,000.00, \$50,000.00 for the first bout and \$450,000.00 for the championship bout. On his 1984 return, petitioner reported wage income of \$85,000.00, \$65,000.00 of which he attributed to New York sources. While the Division properly deemed the remaining \$20,000.00 as New York source income, it improperly included the sum of \$450,000.00 (the proceeds of the Hagler fight) as additional income. Since the total

income actually earned was \$500,000.00, \$415,000.00 rather than \$450,000.00 should have been deemed additional income. The Division must, therefore, recalculate the 1984 deficiency by reducing petitioner's corrected taxable income from \$522,980.00 to \$487,980.00.

G. With respect to penalties asserted by the Division to be due on each of the deficiencies herein, it is hereby found that petitioner's failure to comply with the provisions of Tax Law § 685(a)(1) and (2) (for 1981 through 1983) and with Tax Law § 685(b) (for each of the years at issue) was due to reasonable cause and was not due to willful neglect. Petitioner believed that he was a New Jersey domiciliary for these years. This is evidenced by the fact that he filed New Jersey resident returns and paid New Jersey income tax for each of these years. He, therefore, was not attempting to escape State taxation, but was rather paying tax to the wrong State. In 1984, when his representative was advised that petitioner was subject to the estimated tax provisions of the Tax Law, such estimated tax was paid and a 1984 nonresident return was filed. Penalties must, therefore, be cancelled.

H. The petition of Mostafa Hamsho is granted to the extent indicated in Conclusions of Law "F" and "G"; the Division of Taxation is directed to modify the notices of deficiency issued on February 23, 1988 accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
February 8, 1990

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE